No. 822

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MORRIS GOTTHILF,

Petitioner,

—against—

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.

Respondents.

ANSWER OF RESPONDENTS TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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This is the second time that the petitioner has sought certiorari from this Court to review the same non-final order of the Appellate Division of the Supreme Court of New York, First Department.

We beg leave to refer to the Record in *Gotthilf* v. *Sills*, 375 U.S. 79 (1963). There the petitioner's writ was dismissed on the ground that the petition had been improvidently granted. Petitioner had failed to exhaust his State Court remedies. The present petition should be dismissed for the same reason.

Respondents were awarded judgment by the New York Supreme Court in an action founded on fraud, after peti-

tioner deliberately defaulted. The judgment was affirmed by the Appellate Division of that Court.

Petitioner has since resided in Florida, safe from body execution pursuant to the order of the New York Court. From this refuge he has found the means to retain counsel and pay substantial printing bills in preference to meeting his obligation to respondents, who have been burdened with the staggering cost of innumerable appeals.

Petitioner Failed to Exhaust His Remedies Under the State Law

In 1962 the Court of Appeals of New York dismissed petitioner's appeals from the Appellate Division's affirmance of the lower Court's order for body execution (12 N.Y. 2d 761, Nov. 1, 1962; 12 N.Y. 2d 797, Nov. 9, 1962).

Petitioner could then have returned to the Appellate Division of the Supreme Court within thirty days from the entry of either order, and asked for leave to appeal to the Court of Appeals upon certified questions. (New York Civil Practice Act, Section 592 5(c)).

Rather than adopt this procedure, petitioner elected to seek certiorari from the United States Supreme Court which held the petition to have been improvidently granted because he failed to exhaust his remedies in the State Courts. (*Gotthilf* v. *Sills*, 375 U.S. 79 (1963).

More than a year elapsed after the expiration of petitioner's time to apply to the Appellate Division for permission to appeal on certified questions. In January of 1964 he applied to the New York Court of Appeals seeking to modify the orders of that Court, made in November 1962, so as to

extend his time at that late date to make application to the Appellate Division. The Court of Appeals denied this application on January 9, 1964. Under Section 592 5(c) of the New York Civil Practice Act, the petitioner was obliged to apply to the Appellate Division for leave to appeal on certified questions within thirty days after the entry of the order of the Court of Appeals. Section 5514(c) of the new Civil Practice Laws and Rules does not substantially alter that requirement.

It was never the intention of the Legislature which enacted the new Civil Practice Laws and Rules, nor of those who prepared it, to grant a party the right in perpetuity to obtain a dispensation enlarging his time to appeal beyond the time limits set in its predecessor, Section 592 5(c).

Even assuming that the Court of Appeals had the power to extend petitioner's time, the petitioner's inordinate delay did not warrant such an extension.

The question sought to be presented is not the simple issue of whether a body execution to enforce collection of a debt violates due process. It is rather: Was the due process clause violated by Section 764 of the New York Civil Practice Act as applied in this case where the judgment was founded in fraud and where the debtor refused to make an honest disclosure of his assets and earnings in defiance of the Court?

The right to a body execution in such instance reflects the mores of the commercial community and the considered judgment of the Legislatures of the State of New York and approximately half of the other States.

This question was briefed and argued before this Court, which found that the petitioner did not exhaust his remedies in the State Courts. It is still the fact that he failed to exhaust his remedies in the State Courts.

There is no basis in law or in fact for this petition. It should be dismissed.

Respectfully submitted,

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